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IN THE

Supreme Court of the United States

No. 71-162

BOARD OF REGENTS OF STATE COLLEGES, et al., *Petitioners*,

v.

DAVID F. ROTH, *Respondent*.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL EDUCATION ASSOCIATION AND ROBERT P. SINDERMANN, AMICI CURIAE

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Interest of the Amici Curiae

The National Education Association (NEA) is the largest teacher organization in the United States, with a membership of more than one million professional educators, many of whom are non-tenured teachers in public educational institutions, both at the higher education and elementary and high school levels.

One of NEA's primary purposes is to protect the constitutional rights and academic freedom of teachers. To that end, NEA has participated as *amicus curiae* in numerous cases where these values were at stake, and has conducted surveys throughout the United States to determine the extent to which these values are being preserved. NEA has acquired a nationwide perspective, based upon its experience, which it believes will be of assistance to the Court.

Robert Sindermann is the respondent in *Perry* v. *Sindermann*, No. 70-36, a case which has been set for oral argument with the instant case, and which raises issues similar to those presented here.

The brief for petitioners in the instant case, as well as the briefs filed by *amici* supporting petitioners, advance a number of arguments against affording hearings to non-tenured teachers facing non-renewal—arguments not advanced by the petitioners in *Sindermann* and accordingly not discussed in the briefs filed in that case by Sindermann and NEA. NEA and Sindermann file this *amicus* brief to present their views on these newly-advanced arguments.

SUMMARY OF ARGUMENT

The teacher's right to a statement of reasons and a hearing prior to non-renewal derives from two constitutional sources: the First Amendment, and the due process clause of the Fourteenth Amendment.

1. History and a burgeoning federal caseload reveal that non-renewals frequently are prompted—as they were both here and in *Sindermann*—by teacher activities which at least arguably are protected by the First Amendment. When teachers can receive a non-renewal notice without being told the reasons, and without a hearing, few will be bold enough to speak out on controversial issues especially if such speech is critical of the authorities who will decide their future employment. A principal purpose of the First Amendment is to assure that society will receive those views. When teachers fear to speak, society loses the important contribution which they can make on issues of public significance, particularly their suggestions for improving the way public educational institutions are run.

Petitioners acknowledge that teachers may not be denied renewal for exercising their First Amendment rights, but they insist that an adequate remedy exists—the opportunity

to bring a lawsuit under 42 U.S.C. § 1983. In reality, that remedy does not remove the "chilling effect" of the threat of summary termination. The costs of litigation, and the real danger that the teacher who sues will brand himself too controversial to secure other employment, will deter most teachers from using that remedy. And even where it *is* invoked, the terminated teacher must endure severe hardship while awaiting a decision, and his fellow teachers will have learned that job loss is the price for advocacy.

"The danger of that chilling effect upon the exercise of First Amendment rights must be guarded against with sensitive tools." *Keyishian* v. *Board of Regents,* 385 U.S. 589, 604 (1967). Procedures affording teachers a statement of reasons and a pre-termination hearing furnish an essential buffer between advocacy and job loss—a buffer which will remove that chilling effect. Hypothetically, these First Amendment interests could be served by requiring hearings only in those cases where a teacher's non-renewal is contemplated, at least in part, because of speech or conduct arguably protected by the First Amendment. Realistically, however, such a scheme would be insufficient; for the school bent upon ridding itself of a teacher for expressing unpopular views would then be tempted to conceal its true purpose in order to escape the obligation to provide a hearing; and teachers, knowing this to be the case, would fear to speak out on controversial issues. Only by furnishing a statement of reasons and a pretermination hearing in all non-renewal cases can the First Amendment interests be adequately protected.

2. This Court has repeatedly emphasized that where the State proposes to interfere with "important interests" of the citizen it must first provide procedural due process. This doctrine constitutes a second, wholly separate, source of hearing rights for teachers. As petitioners recognize, the teacher's right to procedural due process turns upon the balancing test enunciated in *Cafeteria Workers* v. *McElroy,*

367 U.S. 886 (1961), i.e. upon weighing the teacher's interest in retaining his job against the State's interest in summary adjudication.

The teacher's interests are clear. Non-renewal deprives the teacher and his family of their sole source of income, and terminates that association with colleagues and students which plays a major part in the teacher's enjoyment of his career. Moreover, the non-renewed teacher, unless he elects to abandon his career, inevitably must bear the cost of relocating—he and his family must move to a new city, find new housing, make new friendships, and start a new life. Finally, empirical evidence demonstrates that in the academic world non-renewal frequently spells the end of a teacher's career —the stigma of non-renewal renders the teacher unemployable.

The asserted countervailing State interests all stem from a misunderstanding of what a due process hearing entails. It does not alter the substantive grounds upon which the State may premise non-renewal. Such factors as mediocrity, incompetency, the availability of better qualified personnel, reduction in teaching force, and shifts in curriculum remain valid grounds for non-renewal, irrespective of whether a right to hearing exists. Nor does a hearing impose a burden upon the State to "prove" its grounds for non-renewal. The function of the hearing is to enable the teacher to be heard before he suffers a severe injury, not to create a forum in which the State must "prove" its reasons. Thus, in terms of both substance and the burden of proof, the distinction between tenured and non-tenured teachers would be preserved. Hearings will not impose unmanageable administrative burdens upon the State, as demonstrated by the growing number of States (including both Wisconsin and Texas, where petitioners here and in *Sindermann* are located) which provide them by statute to elementary and high school teachers threatened with non-renewal. A recent study in the State of Washington, where non-renewal hearings are pro-

vided by statute, confirms that the administrative burden is minimal. Other objections advanced by petitioners and the *amici* supporting petitioners are likewise invalid, as we show in the Argument.

Furthermore, in assessing the State's interest, recognition must be given to the important public benefits which hearings would provide. The public has an interest in the retention of superior teachers, an interest which is threatened when—as here and in *Sindermann*—non-renewal is predicated upon grounds unrelated to teaching caliber. Hearings increase the likelihood that superior teachers will not be terminated unwisely. Hearings also will reduce the enormous burden which non-renewals today place upon the judiciary, by diverting such cases from the courtroom to the campus. Hearings will convince the State in some instances that non-renewal would be unjustified, and in others they will convince the teacher that non-renewal *is* justified, and that litigation is unwarranted. Hearings will also promote accountability of public officials, and assure that decisions are made intelligently and fairly. Finally, the hearing process will remove teacher's fears of speaking on public issues, a gain of inestimable value to the public.

In sum, the *Cafeteria Workers* balance tips heavily in favor of according statements of reasons and hearings to teachers prior to non-renewal.

ARGUMENT

INTRODUCTION

This case presents a classic illustration of the need for notice and hearing prior to the non-renewal of faculty members. A campus riot occurs, and the University summarily suspends 94 black students who were arrested in the riot. Roth, a young, non-tenured Associate Professor of Political Science, is outspokenly critical of the University's handling of the incident, advocating that the students should not

have been suspended *en masse,* and that they should be reinstated subject to individual determinations of guilt. Thereafter, Roth is notified that his employment will not be renewed for the following year. He is neither told the reason for non-renewal nor offered a hearing. The University's file (obtained by Roth only after he sued) discloses that shortly before the decision not to renew (and following Roth's involvement in the black students controversy) the tenured members of his department prepared their written evaluation, rating him a superior teacher, and unanimously "highly recommend[ing]" his reappointment (App. 131-135). The Dean, however, submitted an extensive memorandum recommending that Roth *not* be renewed, and prevailed upon the tenured members to reconsider and withdraw their prior recommendation. One of the Dean's stated reasons was that Roth's criticism of the University's handling of the controversy—e.g. as "authoritarian and autocratic"—reflected "a very unscholarly approach to the truth and the search for knowledge that make it doubtful he has the qualities of scholarship desirable in a faculty member . . . [S]urely we can hire a replacement for Dr. Roth who will follow university policies in . . . demonstrating a greater respect for the truth" (App. 127, 129-130).

Against this setting, and the somewhat similar setting in *Perry* v. *Sindermann,* No. 70-36, this Court is called upon to determine whether, and to what extent, non-renewal must be preceded by notice and hearing. We discuss herein the two separate sources from which we believe the right to such procedural protections derives: from the First Amendment, and from the due process clause of the Fourteenth Amendment.

I. THE FIRST AMENDMENT RIGHT TO A HEARING

In this case, as in *Sindermann,* the record demonstrates that First Amendment considerations were implicated in the non-renewal. Roth was non-renewed, at least in part, because of his criticism of the University's handling of a stu-

dent riot. The NEA's experience, reflected in a growing volume of litigation, is that frequently decisions not to renew a non-tenured teacher's employment are prompted by teacher activities which at least arguably are protected by the First Amendment. NEA is aware of dozens of recently decided or pending cases in which Courts have determined or teachers have claimed that non-renewal was prompted by such activities, and these undoubtedly represent but a small fraction of the total number.[1] Moreover, studies confirm that throughout American history teachers have lost their jobs for advancing "unpopular" views (See NEA *amicus* brief in *Sindermann,* pp. 4-11). Only rarely, however, is a teacher told that it is his advocacy which has prompted his non-renewal (*Sindermann* is such a case). More often, as here, the authorities assert that they have no obligation to advise the teacher of the reasons for non-renewal, and no responsibility to provide a hearing.

In such an atmosphere, few non-tenured teachers will be bold enough to speak out on controversial issues, particularly when their views will be unwelcome to the authorities who will decide their future employment. Necessarily, the cases which come to this Court have involved those teachers — the Pickerings, Sindermanns, and Roths — who have spoken out despite the threat to their job security. From these examples, this Court may derive a mistaken notion that academic freedom is flourishing on American campuses. Regrettably, that is not the case, nor historically has it been.[2]

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[1] Many cases of which NEA is aware are listed in an Appendix to this brief.

[2] NEA *amicus* brief in Sindermann, pp. 4-11. In *Sindermann,* sympathetic fellow teachers were so intimidated by the College's hostility to Sindermann's activities that they feared even to substitute for him while he was absent to testify before the State legislature on their behalf (Brief for Respondent in *Sindermann,* pp. 4a, 7a). See also comment, Constitutional Rights of Public Employees: Progress Toward Protection, 49 N. C. L. Rev. 302, 314 (1971).

When teachers are silenced, the public is denied its "interest in having free and unhindered debate on matters of public importance—the core value of the Free Speech Clause of the First Amendment," *Pickering* v. *Board of Education*, 391 U.S. 563, 573 (1968). The manner in which public educational institutions are run "is a matter of legitimate public concern on which the judgment of the school administration . . . cannot . . . be taken as conclusive." (*Id.* at 571). Rather:

> "On such a question free and open debate is vital to informed decision-making by the electorate. Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how [their institutions ought to be administered]. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal." (*Id.* at 571-572).

Petitioners, and the *amici* supporting petitioners, acknowledge that teachers may not be denied renewal for exercising their First Amendment rights. But they insist that an adequate remedy exists—the opportunity to bring a lawsuit under 42 U.S.C. § 1983. For most teachers that remedy is ephemeral. The outspoken teacher who is denied renewal without a statement of reasons can only guess whether his First Amendment activities have played a role in his job loss. He must decide to bring a lawsuit, incurring great personal expense, just to find out whether he has a cause of action. And even if he *knows* he has a meritorious lawsuit, the barriers to suing are substantial. Many teachers cannot afford to sue; others will fear to do so lest they brand themselves too controversial to secure other employment—the fate which befell Sindermann (See Brief for Respondent in *Sindermann*, pp. 9a-14a). All will suffer the economic hardship and social stigma of unemployment for the months or years until a legal decision is obtained. In the interim, the remaining teachers will have learned the lesson

that the price for advocacy is loss of employment. In sum, the availability of a § 1983 action following non-renewal does not remove the "chilling effect" upon academic freedom of the threat of summary termination. Van Alstyne, *The Constitutional Rights of Teachers and Professors,* 1970 Duke Law Journal 841, 859-860 (1970).

"The danger of that chilling effect upon the exercise of First Amendment rights must be guarded against with sensitive tools." *Keyishian* v. *Board of Regents,* 385 U.S. 589, 604 (1967). Procedures affording teachers a statement of reasons for contemplated non-renewal, and an opportunity for a pre-termination hearing, furnish an essential buffer between advocacy and job loss. Few Universities will openly declare that they are contemplating non-renewal for the exercise of First Amendment rights.[3] A requirement that the reasons for non-renewal be disclosed, rather than shrouded in secrecy, may deter non-renewals so motivated. To be sure, the danger exists that pretexts will be used to camouflage impermissible non-renewals; but surely most university administrators would pause before stooping to such tactics, and the hearing provides a forum in which those who do use pretexts may be exposed. Finally, in situations where a teacher's conduct falls close to the balance line struck in *Pickering,* the hearing affords the teacher a full exploration, prior to non-renewal, of whether his activities are protected by the First Amendment. Precisely because of these prophylactic effects, the right to hearing is an essential bulwark against the stifling of academic freedom. *Speiser* v. *Randall,* 357 U.S. 513 (1958).

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[3] As reflected in the *amicus* brief for The American Council on Education, et al. (page 5), most colleges are committed to functioning as "havens of unfettered discussion . . . a refuge where new concepts can be discussed and developed free from the social constraints which often inhibit discussion in the world of business and government." Such colleges are unlikely to deny renewal for engaging in "unfettered discussion" if the reason for non-renewal must be disclosed.

Hypothetically, these First Amendment interests could be satisfied by requiring hearings only in those cases where a teacher's non-renewal is contemplated, at least in part, because of speech or conduct arguably protected by the First Amendment. Realistically, however, the protection afforded by such a scheme would be insufficient, for the school bent upon ridding itself of a teacher for expressing unpopular views would then be tempted to conceal its true purpose in order to escape the obligation to provide a hearing; and teachers, knowing this to be the case, would fear to speak out on controversial issues. The only way to protect adequately the First Amendment rights of teachers is by affording a statement of reasons and an opportunity for a pretermination hearing in *all* non-renewal cases. That this means hearings will be required in cases which ultimately prove to be wholly without First Amendment implications does not make the procedure overbroad: regulation of an entire field in order to assure against injuries in particular instances which would result from non-regulation is a common device in American jurisprudence. See, e.g., *Smith* v. *California,* 361 U.S. 147, 152-154 (1959); *South Carolina* v. *Katzenbach,* 383 U.S. 301, 329 (1966); *North American Co.* v. *S.E.C.,* 327 U.S. 686, 710-711 (1946); *Assigned Car Cases,* 274 U.S. 564, 582-583 (1927). The key to the propriety of such an across-the-board approach is a determination that—as here—the evil cannot be protected against by a narrower approach. *Ibid.*

In any event, the right to a hearing is clear in this case even if the Court were to take a narrower view. Here it was apparent, when Dean Darken submitted his recommendation to the University President, that Roth's arguably protected activities were among the reasons for the recommendation. Thus, the President, before acting upon the recommendation, should have notified Roth of the proposed action and the reasons therefor, and afforded him an opportunity to be heard. No such hearing having been af-

forded, the non-renewal contravened the First Amendment. The same result is dictated in *Sindermann,* where the College openly stated that Sindermann's arguably protected activities were a cause of his non-renewal, but afforded him no hearing.[4]

II. THE DUE PROCESS RIGHT TO A HEARING

There is a second constitutional source of the teacher's right to a hearing when facing non-renewal of his contract: the Due Process Clause of the Fourteenth Amendment. This Court has repeatedly emphasized that where the State proposes to interfere with "important interests" of a citizen it must first afford him procedural due process. See, e.g. *Bell* v. *Burson,* 402 U.S. 535, 539 (1971). As petitioners recognize, the application of that principle to this case turns upon the balancing test enunciated in *Cafeteria Workers* v. *McElroy,* 367 U.S. 886 (1961), i.e. upon weighing the teacher's interest in retaining his job against the State's interest in summary adjudication. Petitioners' evaluation of those comparative interests, however, leaves much to be desired.

A. The Teacher's Interest

Petitioners seek to minimize the effect of non-renewal upon the teacher: "In our view, the harm experienced . . . may . . . be expressed as inconvenience and the cost of relocating" (Brief for Petitioner, p. 20). "Inconvenience" seems a mild word to describe the hardships visited upon teachers and their families when deprived of their sole source of income. This Court has rather described one in such circumstances as being "drive[n] . . . to the wall," *Sniadach* v. *Family Finance Corp.,* 395 U.S. 337, 341-42 (1969). Likewise, "inconvenience" fails to convey the loss of that association with colleagues and students which plays a major part in the teacher's enjoyment of his career. Apart from

[4] We have argued that free speech considerations emanating from the First Amendment dictate the right to a hearing. The same result can be derived from the Due Process Clause. Since speech is "liberty", it cannot be infringed without procedural due process.

such "inconveniences," as petitioners acknowledge, there is the "cost of relocating," which almost inevitably follows non-renewal in higher education. If Roth cannot teach at Oshkosh, either he must abandon his career or he and his family must move to a new city, find new housing, make new friendships, and start a new life. Contrary to petitioners' assertion (Brief, p. 19) these hardships are scarcely "the same" as those suffered by the cook in *Cafeteria Workers*—who was offered another job by her employer in the same city.

The courts below emphasized the harmful effect which non-renewal has upon a teacher's professional reputation and ability to pursue his career. Petitioners concede (Brief, p. 19) that under *Cafeteria Workers* "if the discharge carries with it a stigma that would foreclose future employment opportunities, due process may require notice and hearing prior to discharge." But petitioners suggest that (*Id.*, p. 19):

> "Employment opportunities are more influenced by economic and enrollment trends than by the mere fact of non-renewal. We venture that in the academic community little or no significance is attached to a non-renewal."

This statement belies both common sense and the realities of the academic world. Roth was one of only 4 teachers not renewed by his University; 438 other non-tenured teachers *were* renewed (App. 124). Can there be any doubt that prospective employers will "attach significance" to that fact? And what will prospective employers be told when they inquire of Wisconsin State University as to Roth's performance there? That it was wholly satisfactory? Or, as is more likely, that it was deficient in the respects set forth in Dean Darken's recommendation—matters which Roth was given no opportunity to rebut? If the latter, can it credibly be asserted that prospective employers will not

"attach significance?" These harms track every non-renewed teacher at any time, but they are greatly magnified when, as now, there is a burgeoning teacher surplus at all levels of education.[5] As Dean Darken put it, "surely we can hire a replacement for Dr. Roth" free of his alleged infirmities (App. 129). Will not other prospective employers feel the same way? In a teacher-surplus market, why hire someone with a black mark against him?

In this instance, common sense is corroborated by the views of the experts in the field. The Chairman of the U.S. Civil Service Commission recently explained, "Being fired from government carries a stigma that prevents many employees from perhaps ever finding gainful employment again."[6] The stigma is especially great in the teaching profession, for the job is an unusually sensitive one, scrutinized closely by the public, and prospective employers will hesitate to hire another school's rejects. The Rhode Island Commissioner of Education has noted that in the academic world non-renewal is considered a "dismissal," and "dismissal [of a teacher] from his position, whether it be during a school year or at the end of a school year, can mean the end of his professional career."[7] A recent NEA survey found that 89.8% of elementary and high school systems allow a teacher to resign before formally notifying him of non-renewal, and 47% *affirmatively recommend* that the teacher resign[8]—a practice explicable only as a reflection

[5] NEA Research Div., *Teacher Job Shortage Ahead,* 49 NEA Research Bull. 69 (1971); Wolfle & Kidd, *The Future Market for Ph.D.'s,* Science, Vol. 173, p. 784 (August 1971).

[6] Statement of Robert Hampton, *Washington Evening Star,* April 12, 1971, p. A-8.

[7] *Domenicone* v. *School Committee;* R.I. Commissioner of Education, May 20, 1970, pp. 3, 4.

[8] NEA Research Div., *School-Board Procedures Upon Non-Renewal of Teachers' Contracts* (Sept., 1971) (Research Memo 1971-72), reprinted in Brief of the NEA as *Amicus Curiae* in *Sindermann,* pp. 1a-8a.

that school authorities generally regard formal non-renewal as a barrier to future employability. Similarly, in higher education, it is "common administrative practice" to allow "a faculty member to resign and 'keep his record clean.'" Caplow and McGee *The Academic Marketplace,* p. 38 (Anchor Books edition, Doubleday & Company, New York, 1965). Finally, the actual experiences of non-renewed teachers in cases which have found their way to court confirm the serious impact of non-renewal upon employability. See Brief for Respondent in *Sindermann,* pp. 9-14a; Petition for Certiorari in *Orr* v. *Trinter,* No. 71-249, p. 4; *Lucia* v. *Duggan,* 303 F.Supp. 112, 116 (D. Mass. 1969).

Petitioners also argue (Brief, p. 12) that if teachers are accorded hearing rights upon non-renewal, the same rights inevitably must be accorded to all public employees. This does not follow at all. The problems of relocation which confront the non-renewed teacher are unique, and the impact upon the future employability of other types of employees is not necessarily as great as it is upon teachers. Moreover, because the teacher occupies a sensitive position subjected to close public scrutiny, he is more vulnerable to arbitrary pressures for employment termination than other civil servants. We express no view as to whether other public employees are entitled to hearings when threatened with job loss, but simply note that a decision that teachers have such rights does not automatically compel the same conclusion for others.

B. The State's Interest

Just as petitioners accord too little weight to the teacher's interest, they incorrectly weigh the State's interest: the State's interest in summary adjudication is unduly magnified, and the public interests which are *advanced* by the hearing process are wholly ignored. We discuss these factors herein.

(1) *The State's Interest in Summary Adjudication*

The "horrors" perceived by petitioners and the *amici* supporting petitioners stem largely from a misconception as to what a due process hearing would entail. We first outline briefly our conception of the minimal hearing procedures required by the Constitution, and then discuss the objections advanced.

The hearing process, to be meaningful, necessarily must begin with notification to the teacher that his non-renewal is contemplated and that he has a right to a detailed statement of the reasons therefor. The teacher must be afforded such reasons and an opportunity to be heard before non-renewal is effectuated (of course, the reasons and/or hearing need be provided only if the teacher wishes them). The teacher must be advised of all the evidence upon which non-renewal is contemplated. He must be permitted to present his arguments and evidence against that result, and accorded the right to confront and cross-examine those whose testimony or reports are said to furnish the basis for non-renewal. The ultimate decision must be based solely on the record made in the hearing.

As we explain more fully herein, this process does not require that the State have "cause"—in the sense required by State law for dismissing tenured teachers—in order to effectuate a non-renewal. Nor does it impose any "burden" on the State to "prove" that non-renewal is justified.[9] The constitutional command is merely that the teacher be afforded a fair and meaningful opportunity to be heard in his own behalf before serious injury is visited upon him.

With this introduction, we turn to the specific objections advanced by petitioners and the *amici* supporting petitioners.

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[9] The lone exception is where First Amendment considerations are involved. In such situations, the State has a burden of proving that the speech it seeks to condemn falls outside the First Amendment's protections. *Speiser* v. *Randall*, 357 U.S. 513, 525-526 (1958).

(a) The Alleged Expansion of Federal Control Over the Grounds for Non-Renewal, and the Alleged Increase in Judicial Involvement in the Faculty Selection Process

The paramount concern of petitioners, and of the *amici* supporting petitioners, is that according procedural protections will lead to federal inroads upon the substantive freedom presently enjoyed by the State in making renewal decisions. As petitioners put it (Brief, p. 14):

> "Although the pivotal issue in Roth would seem to be procedural due process, this is, in fact, merely the opening of the door to judicial inquiry as to what constitutes an 'appropriate' reason for non-renewal.
>
> ". . . [T]hrough the vehicle of the administrative hearings the Courts, Federal as well as State, will be called upon to decide these matters on the merits by determining what satisfies the requirement of an 'appropriate' reason for non-renewal. The courts will be setting the criteria for the selection of the faculty and will, in fact, become the final arbiters . . .
>
> "Further, the courts by being called upon to pass on the sufficiency of the reason for non-retention will be directly involved in the selection of the faculty and the administration of the schools. The courts will not only be determining the criteria for the composition of the faculty, but will actually be selecting the faculty by affirming or reversing the administrative decision."

These fears are wholly imagined.

The federal Constitution already imposes certain limitations upon the State's freedom in non-renewal cases. The State may not predicate non-renewal upon the exercise of constitutional rights;[10] nor may it deny renewal for reasons

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[10] *Keyishian* v. *Board of Regents*, 385 U.S. 589 (1967); *Shelton* v. *Tucker*, 364 U.S. 479 (1960). See Brief for Respondent in *Sinderman*, pp. 17-20.

violative of the equal protection clause;[11] nor may its decision be "arbitrary," i.e. for reasons "wholly without [evidentiary] support"[12] or for reasons which bear no rational connection to the State's interests.[13] But these substantive limitations exist, and their transgression subjects the State to federal judicial intervention, irrespective of whether there is a right to an administrative hearing. Indeed, where these considerations are involved a hearing is likely to *reduce* the chance of federal involvement, either by convincing the State that a contemplated non-renewal should not be pursued, or by convincing the teacher that the State's action is not constitutionally infirm and cannot be overturned in court.

These substantive limitations, of course, touch only a fraction of the myriad reasons why States deny renewal. The remainder involve considerations wholly free of substantive constitutional restraint. And recognizing a right to hearing will not alter in any respect the substantive freedom enjoyed by the States in these areas. It is simply not correct that courts will rule on the "appropriateness" of non-renewals. Nor will they require "cause" for non-renewal comparable to that required by State law for non-renewal of a tenured teacher. All of the reasons asserted by petitioners and the supporting *amici* for non-renewal—incompetency, mediocrity, the availability of better qualified personnel, reduction in teaching force, shifts in curriculum, etc.—will remain valid grounds for non-renewal, irrespective of whether a right to hearing exists. The hearing will enable the teacher to attempt to persuade the State that the ground ought not be pursued, but it will not preclude the State from pursuing

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[11] *Rolfe* v. *County Board of Education*, 391 F.2d 77 (6th Cir. 1968); *Smith* v. *Board of Education*, 365 F.2d 770 (8th Cir. 1966).

[12] *Slochower* v. *Board of Education*, 350 U.S. 551 (1956); *Schware* v. *Board of Bar Examiners*, 353 U.S. 232, 246-247 (1957); *Wieman* v. *Updegraff*, 344 U.S. 183, 192 (1952).

[13] *Schware*, *supra*, 353 U.S. at 239.

it if, following hearing, it is convinced of the correctness of that course.

For these same reasons, hearing rights will not destroy the tenure system. The essential attribute of tenure is that it arms the longer-service teacher with protection against job loss absent "cause." In most States, removal of a tenured teacher requires proof of substantial misconduct. Nothing of this sort would be entailed in furnishing hearings to non-tenured teachers.

The record of the present case provides ample evidence of the valuable function a hearing can perform even in those areas where the State's substantive freedom of action is unlimited. One of the grounds cited by Dean Darken for recommending against renewal was that one day Roth had failed to meet any of his classes and had not applied for an approved absence (App. 126-127). But Roth insists, and the Chairman of his Department corroborates him, that he was ill on that day and had given the customary notice to the Chairman that he was unable to teach (App. 138-139, 143). It may well be that Dean Darken was unaware of these facts and that, had he been aware of the true circumstances, he would no longer have regarded the absence as culpatory. A statement of reasons, and a hearing, might thus have deterred a non-renewal based upon an erroneous or incomplete version of the facts.

Another of the grounds cited by Dean Darken was that Roth had devoted substantial class time during a two-week period to discussing subjects not germane to his course. According to the Dean, his information was based upon "detailed oral reports by four students." (App. 125). But Roth, and other students, deny that this occurred (App. 139, 145). Had a hearing been afforded, it might have been determined that Roth's version was correct, and that the students whose reports were relied upon by Dean Darken either failed to realize the relevancy of the subjects discussed in class, or acted out of hostility to Roth engendered

by his controversial role in campus politics. Thus, affording Roth an opportunity to be heard might have prevented an unjustified non-renewal of a competent teacher.

Yet another ground relied upon by Dean Darken was that Roth failed to give his students a final examination (App. 125). But the Chairman of Roth's Department states that Roth gave his students a "take home" final examination with his approval (App. 143), as other teachers have done in the past (App. 144). Here again, had Roth been afforded a hearing he might have aborted an unwarranted non-renewal.

In each of these instances, federal law imposes no substantive limitation on the State's freedom of action. Obviously, a State may deny renewal to a teacher who does not attend his classes, or who fails to teach materials relevant to his assigned courses, or who fails to administer final examinations in accordance with University regulations. If, following a hearing, a decision were reached not to renew on any of these grounds, it would not be subject to review for substantive deficiencies.[14] Nevertheless the hearing would have fulfilled its role; it would have enabled the teacher to present his side of the story prior to the decision.

One of the *amicus* briefs asserts that to require hearings in an area where the ultimate decision is discretionary and not governed by "ascertainable standards" would be "quite unprecedented in Anglo-American jurisprudence."[15] This is simply incorrect. As early as 1926 this Court declared, in

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[14] We are assuming, of course, that these were indeed the true grounds for the non-renewal, and not merely pretexts for, or accompaniments to, a decision based upon constitutionally impermissible grounds. We are further assuming that, in the circumstances, these grounds would not constitute "arbitrariness" violative of the Fourteenth Amendment. Whether these assumptions are correct is a matter still pending in the district court, in that part of the case not before this Court.

[15] Brief of The American Council on Education, et al., page 13.

Goldsmith v. *United States Board of Tax Appeals*, 270 U.S. 117, 123 (1926):

> "The rules adopted by the board provide that 'the board may in its discretion deny admission, suspend or disbar any person.' But this must be construed to mean the exercise of a discretion to be exercised after fair investigation, with such a notice, hearing and opportunity to answer for the applicant as would constitute due process."

(b) The Alleged Incapacity of Colleges and Universities to Conduct Hearings

Petitioners assert (Brief, pp. 16-17) that colleges and universities were not "intended to be courts or quasi-judicial agencies" and cannot provide administrative bodies competent "to decide difficult constitutional issues." But they already perform this function in the case of tenured teachers when dismissal for cause is contemplated (*Id.* p. 4), and the hearings required in the case of non-tenured teachers would be less "quasi-judicial" because there is no statutory "cause" adjudication to be made. As we have shown, most of the grounds for non-renewal do not rise to substantive constitutional dimensions, and involve questions of university policy and practice which lay bodies may be more competent to deal with than lawyers or judges. When constitutional questions *are* involved—e.g., where non-renewal is contemplated for activities which are arguably protected by the First Amendment—the State has a responsibility to assure that its conduct comports with the Constitution, a responsibility which is enhanced by the full elicitation of the facts that a hearing would provide. Surely petitioners do not suggest that they terminate the employment of teachers without regard to the dictates of the Constitution. The State must obtain the necessary expertise to make these judgments, and invariably, as here, has attorneys whose primary function is

to advise State agencies with respect to their legal rights and responsibilities.[16]

(c) The Alleged Administrative Burden

Petitioners assert that the administrative burden of having to "conduct hearings on every case of non-renewal, or even if limited to those cases where requested, is staggering" (Brief, p. 18). This assertion is hard to accept. There were, after all, only 4 teachers denied renewal in 1970 at Oshkosh.[17] Moreover, a Wisconsin statute affords a hearing to non-tenured teachers at the elementary and secondary school levels, Wisc. Stats. § 118.22 (1969), and if that burden is sustainable surely the burden of providing hearings to the much smaller number of non-tenured teachers in higher education is not beyond the State's capacity. Indeed, it is ironic that in Texas (where *Sindermann* arises); Wisconsin (where this case arises) and California (one of the *amici*, also claiming burden, Brief of the Board of Trustees of the California State Colleges, p. 10), state law accords elementary and high school teachers the hearing rights resisted for college teachers in this case.[18] The widespread statutory provision of hearings in a large number of states for non-tenured teachers whose non-renewal is contemplated

[16] Of course, nothing precludes the State from designating a hearing tribunal which possesses expertise. An NEA survey discloses that one-fourth of the nation's school systems utilize third-parties to *hear* contract non-renewal cases, and 15.6% utilize third-parties to *determine* the non-renewal issue. NEA Research Division, *School Board Procedures Upon Non-Renewal of Teachers' Contracts, supra.*

[17] Petitioners state (Brief, p. 18, n. 11) that there were a total of 206 teachers notified of non-renewal throughout the Wisconsin University System in 1970. This information is not in the record, and thus we do not know how many of this total were non-renewals for economic reasons—non-renewals which would almost surely not result in requests for hearings.

[18] Texas Code Ann. § 21-204 (1969); Calif. Educ. Code § 13443 (West 1969).

(see NEA *amicus* brief in *Sindermann*, pp. 19-22) demonstrates that the administrative burden is not substantial.

Moreover, the burden is likely to be very much less than raw statistics might suggest. For the teacher whose performance is truly mediocre or incompetent is unlikely to demand a hearing at which his deficiencies will only be dramatized and publicized. And the teacher whose non-renewal stems from a reduction in force is even less likely to complain. Thus, it is reasonable to expect that only a fraction of the teachers notified of contemplated non-renewal, and given a statement of the reasons therefor, would invoke their right to a hearing.

The lack of administrative burden is confirmed by a recent study in the State of Washington, where a statute accords teachers facing non-renewal the right to a hearing (either before the school board or in court, at the teacher's option). In the school year 1969-70, there was a "teacher turnover" from all causes (deaths, retirements, resignations, reductions in force, non-renewals, etc.) of 4,225. But only 58 teachers received notices of non-renewal for reasons other than economy. Of these, only 26 sought hearings, 24 before the school board and 2 in court. Of the 24 board hearings, 6 resulted in retention of the teacher. In the school-year 1970-71, total teacher turnover was 4,224, but only 47 teachers received notices of non-renewal for reasons other than economy. Of these, 21 sought hearings, 19 before the school board and 2 in court, and 6 board hearings resulted in retention of the teacher.[19]

(d) The Alleged Deterrent to Non-Retention

Petitioners, and each of the *amici*, predict that if a statement of reasons and hearing are required colleges will not

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[19] Joint Committee on Education, Washington State Legislature, *Washington State's Continuing Contract and Discharge Laws for Certificated Common School Employees: A Preliminary Report to the Washington State Legislature by the Joint Committee on Education*, pp. 8-9, 35-36 (December 17, 1971).

initiate non-renewal proceedings against teachers who ought not be retained. This will occur, they predict, for two quite different reasons: (a) Because the reasons for non-renewal are often "subtle," they are incapable of articulation, and faced with the duty to articulate the State will sooner retain the teacher; and (b) In borderline cases, retention will be chosen as easier than trying to "prove" the teacher's inadequacies. Each of these reasons is fallacious.

The first is contrary to the way the academic process operates. As petitioners have themselves emphasized (App. 121-123, Brief, pp. 7, 18), the ultimate decision on non-renewal is made by the University President, on the basis of written recommendations received from his subordinates. If the grounds for recommending non-renewal can be articulated with sufficient particularity to enable the President to act thereon, as they were here (App. 125-131), there obviously can be no inability to articulate them to the teacher. Articulation was likewise no problem in *Sindermann* (*Sindermann* Appendix, pp. 12-23), where an elaborate press release was issued. And the California *amicus* has explained that written recommendations are the unvarying practice in that State (Brief, p. 6). Though the reasons for non-renewal may in some cases be "subtle," we find it difficult to believe that the academic community is incapable of articulating subtle concepts.[20]

The second fear—that retention will be chosen in borderline cases to avoid the burden of "proving" inadequacies—proceeds from the erroneous premise that at a hearing the State would have to "prove" the validity of its grounds for favoring non-renewal. As we have already shown (*supra*, pp. 17-18), there will be no such burden.

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[20] In some situations, of course, different persons may be advocating non-renewal for different reasons, but that is no obstacle to articulation. The teacher can be told precisely what the situation is, i.e. that some advocate his non-renewal for reason "A", and others for reason "B". The teacher can then address himself to all the grounds at the hearing.

(e) The Asserted Need to Avoid Inter-Personal Conflict

Petitioners and the *amici* suggest that the confrontation occasioned by a hearing would cause unpleasant inter-personal conflicts. They suggest that administrators and colleagues will hesitate to recommend non-renewal if they know that they will have to explain their reasons to the teacher, and that the problem will be compounded if the teacher indeed succeeds in securing renewal after learning who has sought his ouster.

These psychological considerations, of course, accompany any fair dismissal procedure. Colleges and universities having a tenure system already face them when removal of a tenured teacher is sought. Elementary and high schools in states where hearings are required prior to non-renewal already face them. The federal government, with its statutory Civil Service procedures, faces them. And every private employer who contractually affords a hearing upon termination—the overwhelming majority of American industry[21]—faces them.

This is not to say that the concerns are not real. There are undoubtedly persons who would advocate the ouster of a teacher—whether for good reasons or bad—if the teacher's removal could be accomplished without having to face him, but who would be unwilling to endure the discomfiture of explaining their reasons in the teacher's presence. And it is certainly true that when a teacher fights successfully for renewal the prior efforts to oust him will leave scars. But these are prices which generally have been recognized as worth paying in order to afford justice to the employee; the employee's interest in having an opportunity to defend his job has been deemed more important than the avoidance of inter-personal discomfiture which could be achieved by

[21] Eighty percent of collective bargaining agreements provide for hearings in connection with termination of employment. BNA, *Collective Bargaining Negotiations and Contracts*, page 40:4 (1969).

summary dismissal. Just as the scales have tipped in favor of the employee's interest throughout private industry in America, so ought they to tip under the balancing test of *Cafeteria Workers*.

(f) The Asserted Risk of Over-Caution in the Hiring Process

Finally, petitioners and the *amici* assert that if hearings are a necessary prelude to non-retention, schools will "follow a counsel of over-caution in their hiring practices," and innovative and non-conformist teachers will not be hired; they warn that "the schools would be left with a teaching force of homogenized mediocrities."

This fear, too, seems to emanate from the erroneous conception that a State must "prove" something in order to justify non-renewal. As we have shown, affording teachers the right to be heard does not increase the State's substantive burdens in denying renewal to unsatisfactory employees; errors in the hiring process can be remedied as surely with a hearing as without.

Moreover, it is absurd to think that America's colleges and universities—which are avowedly striving for controversy and innovation, and deplore mediocrity[22]—would alter their fundamental goals and staff themselves with mediocrities simply because required to afford non-renewal hearings. On the contrary, the provision of such hearings will strengthen faculties:

> "It is a social fact that the best academic men are attached to the ideology of a community of scholars and believe strongly in academic freedom. Places that fit these beliefs are more attractive than those that do not—recruitment and retention are shaped accordingly." Clark, Faculty Authority, 47 A.A.U.P. Bulletin 293 (1961) quoted in Emerson, Haber & Dorsen, *Po-*

[22] Brief of The American Council on Education, et. al., pp. 5, 8.

litical and Civil Rights in the United States, Vol. 1, p. 931 (1967).

(2) *The Public Interest in Providing Hearings*

Petitioners, and the *amici* supporting petitioners, assume that the only State interests are those which they advance *against* the provision of statements of reasons and hearings. In fact, there are several public interests which are *served* by the provision of procedural due process, and which weigh heavily in favor of affording such procedures. We discuss these herein.

(a) The Public Interest in Academic Freedom

As we have previously discussed, the hearing process will remove teachers' fears of speaking on public issues, a gain of inestimable value to the public.

(b) The Public Interest in the Retention of Superior Teachers

In both *Sindermann* and *Roth,* the non-renewed teacher was an exceptionally good teacher, and the reasons prompting non-renewal had nothing to do with teaching capability. Roth's teaching ability was rated "excellent," and his professional and scholarly growth "superior"; it was found that he "manages discussion well and his students seem highly motivated and involved" (Roth App. 132-133). Sindermann had ten years' experience teaching in Texas colleges, his colleagues evaluated him "a totally competent person professionally," and his excellence was attested by the fact that the President of the College named him Co-Chairman of his Department for a time (Sindermann App. 12, 52). That teachers of distinction are denied renewal is not uncommon. Caplow & McGee, *The Academic Marketplace,* pp. 50-51 (Anchor Books edition, Doubleday & Co., New York, 1965):

> "Our data abound in complaints from professors that they were not told exactly either why a given colleague

> was hired or fired or what he had or did not have that someone else had or did not have. Every university has its legends about certain firings . . . A haunting minor theme in the interview reports is a story like this [not an actual quotation]: 'He was one of the best young men we had, brilliant, productive, an excellent teacher, highly recommended, and unanimously supported by the department. When he came up for tenure, he was fired. We never knew why.' "

Public educational institutions are not private clubs; they are administered for the public good. The public has an interest in academic excellence and in the retention of superior teachers in such institutions. When it is proposed that such a teacher be non-renewed for reasons unrelated to teaching ability, the public interest is safeguarded by procedures which assure that mistakes are not made, and that the teacher has a full opportunity to demonstrate that the proposed grounds for non-renewal are ill-advised. We have already shown that the bases for Dean Darken's recommendation that Roth not be renewed may well have been factually erroneous. If so, the citizens of Wisconsin have needlessly been deprived of a fine teacher. A procedure which reduces the prospect of such error is in the public interest.

(c) Reduction of the Judicial Burden

As is evident from even a cursory view of current federal court dockets, there are today legions of cases pending under 42 U.S.C. § 1983 brought by non-renewed teachers.[23] These teachers generally have gone to court because there was no other forum in which their claims could be heard. This case load is doubly unfortunate: it puts a strain on already crowded federal court dockets, and it invites the

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[23] See, e.g., the 27 pending cases cited in the Appendix to this brief and the 100 pending cases cited in the Appendix to the NEA's *amicus* brief in *Orr* v. *Trinter*, No. 71-249.

very judicial involvement in academic community affairs which petitioners and the supporting *amici* abhor.

An important contribution of an administrative hearing procedure is that it will divert such cases from the courthouse to the campus. In many if not most cases, a pretermination hearing will obviate ultimate resort to the courts. Where the contemplated non-renewal is truly unjustified or unwise, the hearing is likely to persuade the State not to pursue it. On the other hand, where non-renewal is truly justified, the hearing is likely to convince the teacher that that is so, and demonstrate the futility of his incurring the enormous costs necessary to institute legal proceedings. Cf. *Murray* v. *Blatchford,* 307 F.Supp. 1038, 1053 (D.R.I. 1969):

> "[T]here was no opportunity for vigorous and fully informed adversarial confrontation on the issues raised by Murray. Had such confrontation emerged within the Peace Corps as it has now in the courts, this entire litigation might have been avoided."

See also Comment, Constitutional Rights of Public Employees: Progress Toward Protection, 49 N. C. L. Rev. 302, 318 (1917).

(d) The Public Interest in Accountability

Yet another public interest served by the hearing process is the assurance that non-renewal decisions are made intelligently and fairly. Hearings promote accountability; they assure fairness and integrity. The public inevitably benefits when its public officials are compelled to act responsibly and justly. Cf. O'Neil, *Of Justice Delayed and Justice Denied: The Welfare Prior Hearing Cases,* 1970 Sup. Ct. Rev. 161, 184-190.

In sum, the teacher's personal interests threatened by non-renewal, coupled with the public benefits which inure from the hearing process, far outweigh the factors advanced

by petitioners and the supporting *amici* in their efforts to avoid such procedures. On the balance of *Cafeteria Workers,* teachers are entitled to a statement of reasons and an opportunity to be heard before they are denied renewal.

CONCLUSION

For the reasons set forth hereinabove, the decision of the Court below should be affirmed.

Respectfully submitted,

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APPENDIX

Partial listing of recently decided and pending cases involving claims under 42 U.S.C. § 1983 by nontenured teachers that their contracts were not renewed because of their exercise of First Amendment rights. This list does not include any cases involving dismissals of teachers during a contract year.

I. CASES PENDING:

S.D. Alabama: *Dickerson* v. *Board of School Commissioners of Mobile County,* C.A. No. 3003-63-T

The complaint, filed by three nontenured white teachers who had been employed in all-black schools of the Mobile, Alabama school system, alleges that their contracts were not renewed because of their involvement in peaceful protests against alleged violations by the school system of the civil rights of black students.

W.D. Arkansas: *Appler* v. *Mountain Pine School District,* HS-71-C-16

Plaintiff, a nontenured teacher, alleges that his contract was not renewed because he assigned *The Caine Mutiny* to his class.

D. Connecticut: *Simard* v. *Board of Education of Groton,* C.A. 14379

Plaintiff, a nontenured teacher, alleges his contract was not renewed in retaliation for his having taken a leading role in negotiations between the teachers' association and the school board.

D. Connecticut: *Pavlak* v. *Duffy,* C.A. No. 13436

The complaint alleges that the plaintiff was one of six nontenured faculty members at Northwestern Connecticut Community College whose contracts were not renewed because of their support for the prior president of the col-

lege, who had been asked to resign by the board of trustees.

District of Columbia: *Cardinale* v. *Washington Technical Institute*, C.A. No. 1052-71

Plaintiff, a teacher at Youth Manpower Training Program, alleges that her contract was not renewed because she had disagreed with the policy of the Program Director, and complained to the funding agency, U.S. Department of Labor.

S.D. Georgia: *Smith* v. *Sessions, et al.*, C.A. No. 1684

Plaintiff, a principal, alleges that the nonrenewal of his contract, on the ground of his public disagreements with school board policies, violated his First Amendment rights.

N.D. Illinois: *Miller* v. *School District 167, Cook County*, C.A. 71-C-1109

The complaint alleges that plaintiff's contract was not renewed because he was critical of the Board of Education.

N.D. Illinois: *Kalish and Enbysk* v. *Board of Education*, C.A. No. 69-C-1056

The complaint, filed by two nontenured teachers employed at an Illinois junior college, alleges that their contracts were not renewed because of their exercise of their constitutionally protected rights to speak out on matters concerning the policies of the college and their activities in organizing a professional association of teachers.

N.D. Iowa: *Mahood* v. *Ida Grove Community School District et al.*, C.A. No. 71-C-3025-W
Dodds v. *Ida Grove Community School District et al.*, C.A. No. 71-C-3026-W

Plaintiffs, nontenured teachers, allege that their contracts were not renewed because they

sent a letter to school board members inquiring about the renewal of their principal's contract.

N.D. Iowa: *Webb* v. *Lake Mills Community School District et al.*, C.A. No. 71-C-2053-C

A nontenured dramatics teacher alleges that his contract was not renewed because he produced plays which contained language the school board found objectionable.

E.D. Kentucky: *Aulck* v. *Jones et al.*, C.A. No. 1576

Plaintiff asserts that his contract was not renewed because of his associational activities and his criticism, — including "letters to the editor" — of school system officials.

S.D. Mississippi: *Thompson* v. *Madison County Board of Education, et al.*, C.A. No. 4692

A black nontenured social studies teacher alleges his contract was not renewed because of his assignment of essays on the shortcomings of the state of Mississippi and his complaints, as an elected alderman, of the misuse of Title I funds.

E.D. Missouri: *Reed* v. *Parkway School District*, Cause No. 70-C-584 (4), on appeal to the Eighth Circuit, No. 71-1640

Plaintiff, a nontenured teacher, alleges that her contract was not renewed after she distributed through the faculty mailbox information concerning activities of the Missouri State Teachers Association. She has appealed the dismissal of the complaint to the Eighth Circuit.

W.D. Missouri: *Wilson* v. *Pleasant Hills School District R-III, et al.*, appeal pending in Eighth Circuit, No. 71-1440

The complaint alleges that a nontenured teacher's contract was not renewed because of his activities as the leader of the local teachers association. A decision adverse to the teacher has been appealed to the Eighth Circuit.

W.D. Missouri: *Gieringer* v. *Center School District,* C.A. No. 18515-2

The complaint alleges that the contract of a nontenured teacher with 11 years' teaching experience was not renewed because he made misstatements of fact in a report to the local teachers association on the allocation of funds for teacher salaries.

D. Nevada: *Maule* v. *Zander,* C.A. No. R-2574

Plaintiff, a nontenured teacher, alleges that he was not rehired as a result of his speech critical of the school administration.

N.D. Texas: *Goade* v. *Taylor, et al.,* C.A. 4-1521

Plaintiff, a nontenured teacher, alleges that his contract was not renewed because he discussed with his students controversial issues such as drugs, war, and dress codes.

N.D. Texas: *Lusk* v. *Estes., et al.,* C.A. 3-4164-C

Plaintiff, a nontenured instructor in the Reserve Officers Training Corps, alleges that his contract was not renewed because he criticized the school board's approach to discipline.

S.D. Texas: *Zimmerer* v. *Spencer, et al.,* C.A. 69-H-804

Plaintiff, an instructor and acting department chairman in a junior college, alleges that she was demoted and that later her contract was not renewed, after expressing her concern for the academic quality of her department and criticizing the employment policies of the college.

W.D. Texas: *Willmon* v *Gutierrez,* C.A. DR-70C-A-12

A nontenured teacher alleges that her contract was not renewed because she placed right-wing political tracts in the school lounge

E.D. Virginia: *Johnson* v. *Harnel, et al.*, C.A. No. 411-71-R

Plaintiff, teaching at a community college, alleges that she was not retained because of her extra-curricular involvement in organizing and teaching at a free university.

E.D. Virginia: *National Faculty Association of Community and Junior Colleges* v. *State Board for Community Colleges, et al.*, C.A. No. 2-7-69-R

Four nontenured instructors were not renewed, they contend, for their active role in organizing a faculty association on campus.

N.D. West Virginia: *Chitwood, et al* v. *Flaster, et al.*, C.A. No. 71-8-F

Plaintiffs, who were teachers at a state college, allege that their contracts were not renewed because of their public involvement in anti-war activities and their criticism of the college administration.

W.D. Wisconsin: *Determan* v. *Joint School District No. 1, Villages of Gratiot, et al.*, C.A. No. 70-C-296

Plaintiff, without tenure, asserts that his contract was not renewed in retaliation for his leadership activity in the local teachers association.

D. Wyoming: *Bertot* v. *School District No. 1, Albany County*, C.A. No. 5623

Plaintiff, a nontenured teacher, asserts that her contract was not renewed because she showed interested students a film on black militancy after school hours.

D. Wyoming: *Sweeney* v. *School District No. 1, Albany County*, C.A. No. 5624

Plaintiff, a nontenured teacher, alleges that her contract was not renewed because she objected to a student dress code on a radio panel discussion program.

II. CASES DECIDED:

E.D. Arkansas: *Downs* v. *Conway School District*, 328 F. Supp. 338

The court found that the contract of a nontenured teacher was not renewed because she had exercised rights of free speech and petition in criticizing various policies of the school administration, including its neglect of a smoking incinerator on the playground. The court ordered the teacher reinstated with back pay.

M.D. Florida: *Stevenson* v. *Allen*, C.A. No. 70-33-Civ. T. (settled)

The complaint, filed by a nontenured professor at the University of South Florida, alleged that his contract had not been renewed because of his outspoken criticism of U.S. participation in the Viet Nam War, his open opposition to the Federal government's plan to create and maintain a system of anti-ballistic missiles, and his personal association with a large segment of the student body in peaceful off-campus protestations and other peaceful activities.

N.D. Indiana: *Roberts* v. *Lake Central School Corp. et al.*, 317 F. Supp. 63, 1970

The court ordered reinstatement of a teacher whose contract had not been renewed because of his criticism of the school administration during collective negotiations.

N.D. Mississippi: *Armstead* v. *Starkville Municipal Separate School District*, C.A. No. EC 70-51-S (July 27, 1971)

The court found that a black teacher was not reemployed because she had circulated documents criticizing alleged racial discrimination by school authorities against black educators. The teacher was ordered reinstated by the court.

D. New Hampshire: *Chase v. Fall Mountain Regional School District*, C.A. No. 3112 (July 28, 1971)

The court found that the contract of a nontenured teacher, who was chief negotiator for the local teachers association, was not renewed because of statements—critical of the school administration—made during the course of collective negotiations.

E.D. Texas: *Montgomery* v. *White* (320 F. Supp. 303)

The court found that a nontenured teacher's contract was not renewed as a result of his activity in a voter registration drive.

E.D. Virginia: *Haubner v. Rushton*, C.A. No. 4835-A

Plaintiff, a nontenured professor at Northern Virginia Community College, alleged that he was not reappointed because of his activity in attempting to organize at the college an affiliate of the National Faculty Association. On December 4, 1969, after a day and a half of trial, the defendants agreed to a settlement under which plaintiff was awarded $20,000.

E.D. Virginia: *Lee* v. *Smith, et al.*, C.A. No. 71-8-F

The court found, in a consent decree, that the contract of the plaintiff, a nontenured teacher, was not renewed as a result of his involvement in a dispute regarding state teacher association election procedures. Damages were awarded to the teacher and the nonrenewal was ordered expunged from his record.

NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

PERRY ET AL. *v.* SINDERMANN

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 70–36. Argued January 18, 1972—Decided June 29, 1972

Respondent was employed in a state college system for 10 years, the last four as a junior college professor under a series of one-year written contracts. The Regents then declined to renew his employment for the next year, without giving him an explanation or prior hearing. Respondent then brought this action in the District Court, alleging that the decision not to rehire him was based on respondent's public criticism of the college administration and thus infringed his free speech right, and that the Regents' failure to afford him a hearing violated his procedural due process right. The District Court granted summary judgment for petitioners, concluding that respondent's contract had terminated and the junior college had not adopted the tenure system. The Court of Appeals reversed on the grounds that, despite lack of tenure, nonrenewal of respondent's contract would violate the Fourteenth Amendment if it was in fact based on his protected free speech, and that if respondent could show that he had an "expectancy" of re-employment, the failure to allow him an opportunity for a hearing would violate the procedural due process guarantee. *Held:*

1. Lack of a contractual or tenure right to re-employment, taken alone, did not defeat respondent's claim that the nonrenewal of his contract violated his free speech right under the First and Fourteenth Amendments. The District Court therefore erred in foreclosing determination of the contested issue whether the decision not to renew was based on respondent's exercise of his right of free speech. Pp. 3–5.

2. Though a subjective "expectancy" of tenure is not protected by procedural due process, respondent's allegation that the college had a *de facto* tenure policy, arising from rules and understandings officially promulgated and fostered, entitled him to an oppor-

See concur + dissent

tunity of proving the legitimacy of his claim to job tenure. Such proof would obligate the college to afford him a requested hearing where he could be informed of the grounds for his nonretention and challenge their sufficiency. Pp. 6–10.

430 F. 2d 939, affirmed.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, and REHNQUIST, JJ., joined. BURGER, C. J., filed a concurring opinion. BRENNAN, J., filed an opinion dissenting in part, in which DOUGLAS, J., joined. MARSHALL, J., filed an opinion dissenting in part. POWELL, J., took no part in the decision of the case.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 70–36

Charles R. Perry et al., Petitioners, v. Robert P. Sindermann, etc. | On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[June 29, 1972]

MR. JUSTICE STEWART delivered the opinion of the Court.

From 1959 to 1969 the respondent, Robert Sindermann, was a teacher in the state college system of the State of Texas. After teaching for two years at the University of Texas and for four years at San Antonio Junior College, he became a professor of Government and Social Science at Odessa Junior College in 1965. He was employed at the college for four successive years, under a series of one-year contracts. He was successful enough to be appointed, for a time, the cochairman of his department.

During the 1968–1969 academic year, however, controversy arose between the respondent and the college administration. The respondent was elected president of the Texas Junior College Teachers Association. In this capacity, he left his teaching duties on several occasions to testify before committees of the Texas Legislature, and he became involved in public disagreements with the policies of the college's Board of Regents. In particular, he aligned himself with a group advocating the elevation of the college to four-year status—a change opposed by the Regents. And, on one occasion, a newspaper advertisement appeared over his name that was highly critical of the Regents.

Finally, in May 1969, the respondent's one-year employment contract terminated and the Board of Regents voted not to offer him a new contract for the next academic year. The Regents issued a press release setting forth allegations of the respondent's insubordination.[1] But they provided him no official statement of the reasons for the nonrenewal of his contract. And they allowed him no opportunity for a hearing to challenge the basis of the nonrenewal.

The respondent then brought this action in a federal district court. He alleged primarily that the Regents' decision not to rehire him was based on his public criticism of the policies of the college administration and thus infringed his right to freedom of speech. He also alleged that their failure to provide him an opportunity for a hearing violated the Fourteenth Amendment's guarantee of procedural due process. The petitioners—members of the Board of Regents and the president of the college—denied that their decision was made in retaliation for the respondent's public criticism and argued that they had no obligation to provide a hearing.[2] On the basis of these bare pleadings and three brief affidavits filed by the respondent,[3] the District Court granted summary judgment for the petitioners. It concluded that the respondent had "no cause of action against the [petitioners] since his contract of em-

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[1] The press release stated, for example, that the respondent had defied his superiors by attending legislative committee meetings when college officials had specifically refused to permit him to leave his classes for that purpose.

[2] The petitioners claimed, in their motion for summary judgment, that the decision not to retain the respondent was really based on his insubordinate conduct. See n. 1, *supra*.

[3] The petitioners, for whom summary judgment was granted, submitted no affadavits whatever. The respondent's affadavits were very short and essentially repeated the general allegations of his complaint.

ployment terminated May 31, 1969, and Odessa Junior College has not adopted the tenure system."[4]

The Court of Appeals reversed the judgment of the District Court. *Sindermann* v. *Perry*, 430 F. 2d 939. First, it held that, despite the respondent's lack of tenure, the nonrenewal of his contract would violate the Fourteenth Amendment if it in fact was based on his protected free speech. Since the actual reason for the Regents' decision was "in total dispute" in the pleadings, the court remanded the case for a full hearing on this contested issue of fact. *Id.*, at 942–943. Second, the Court of Appeals held that, despite the respondent's lack of tenure, the failure to allow him an opportunity for a hearing would violate the constitutional guarantee of procedural due process if the respondent could show that he had an "expectancy" of re-employment. It, therefore, ordered that this issue of fact also be aired upon remand. *Id.*, at 943–944. We granted a writ of certiorari, 403 U. S. 917, and we have considered this case along with *Board of Regents* v. *Roth*, *ante*.

I

The first question presented is whether the respondent's lack of a contractual or tenure right to re-employment, taken alone, defeats his claim that the nonrenewal of his contract violated the First and Fourteenth Amendments. We hold that it does not.

For at least a quarter century, this Court has made clear that even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not act. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—

[4] The findings and conclusions of the District Court—only several lines long—are not officially reported.

especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to "produce a result which [it] could not command directly." *Speiser* v. *Randall*, 357 U. S. 513, 526. Such interference with constitutional rights is impermissible.

We have applied this general principle to denials of tax exemptions, *Speiser* v. *Randall*, *supra*, unemployment benefits, *Sherbert* v. *Verner*, 374 U. S. 398, 404–405, and welfare payments, *Shapiro* v. *Thompson*, 394 U. S. 618, 627 n. 6; *Graham* v. *Richardson*, 403 U. S. 365, 374. But, most often, we have applied the principle to denials of public employment. *United Public Workers* v. *Mitchell*, 330 U. S. 75, 100; *Wieman* v. *Updegraff*, 344 U. S. 183, 192; *Shelton* v. *Tucker*, 364 U. S. 479, 485–486; *Torasco* v. *Watkins*, 367 U. S. 488, 495–496; *Cafeteria Workers* v. *McElroy*, 367 U. S. 886, 894; *Cramp* v. *Board of Public Instruction*, 368 U. S. 278, 288; *Baggett* v. *Bullitt*, 377 U. S. 360; *Elfbrandt* v. *Russell*, 384 U. S. 17; *Keyishian* v. *Board of Regents*, 385 U. S. 589, 605–606; *Whitehill* v. *Elkins*, 389 U. S. 54; *United States* v. *Robel*, 389 U. S. 258; *Pickering* v. *Board of Education*, 391 U. S. 563, 568. We have applied the principle regardless of the public employee's contractual or other claim to a job. Compare *Pickering* v. *Board of Education*, *supra*, with *Shelton* v. *Tucker*, *supra*.

Thus the respondent's lack of a contractual or tenure "right" to re-employment for the 1969–1970 academic year is immaterial to his free speech claim. Indeed, twice before, this Court has specifically held that the nonrenewal of a nontenured public school teacher's one-year contract may not be predicated on his exer-

cise of First and Fourteenth Amendment rights. *Shelton v. Tucker, supra; Keyshian* v. *Board of Regents, supra.* We reaffirm those holdings here.

In this case, of course, the respondent has yet to show that the decision not to renew his contract was, in fact, made in retaliation for his exercise of the constitutional right of free speech. The District Court foreclosed any opportunity to make this showing when it granted summary judgment. Hence, we cannot now hold that the Board of Regents' action was invalid.

But we agree with the Court of Appeals that there is a genuine dispute as to "whether the college refused to renew the teaching contract on an impermissible basis—as a reprisal for the exercise of constitutionally protected rights." 430 F. 2d, at 943. The respondent has alleged that his nonretention was based on his testimony before legislative committees and his other public statements critical of the Regents' policies. And he has alleged that this public criticism was within the First and Fourteenth Amendment's protection of freedom of speech. Plainly, these allegations present a *bona fide* constitutional claim. For this Court has held that a teacher's public criticism of his superiors on matters of public concern may be constitutionally protected and may, therefore, be an impermissible basis for termination of his employment. *Pickering* v. *Board of Education, supra.*

For this reason we hold that the grant of summary judgment against the respondent, without full exploration of this issue, was improper.

II

The respondent's lack of formal contractual or tenure security in continued employment at Odessa Junior Col-

lege, though irrelevant to his free speech claim, is highly relevant to his procedural due process claim. But it may not be entirely dispositive.

We have held today in *Board of Regents* v. *Roth*, *ante*, that the Constitution does not require opportunity for a hearing before the nonrenewal of a nontenured teacher's contract, unless he can show that the decision not to rehire him somehow deprived him of an interest in "liberty" or that he had a "property" interest in continued employment, despite the lack of tenure or a formal contract. In *Roth* the teacher had not made a showing on either point to justify summary judgment in his favor.

Similarly, the respondent here has yet to show that he has been deprived of an interest that could invoke procedural due process protection. As in *Roth*, the mere showing that he was not rehired in one particular job, without more, did not amount to a showing of a loss of liberty.[5] Nor did it amount to a showing of a loss of property.

But the respondent's allegations—which we must construe most favorably to the respondent at this stage of the litigation—do raise a genuine issue as to his interest in continued employment at Odessa Junior College. He alleged that this interest, though not secured by a formal contractual tenure provision, was secured by a no less binding understanding fostered by the college administration. In particular, the respondent alleged that the college had a *de facto* tenure program, and that he had tenure

[5] The Court of Appeals suggested that the respondent might have a due process right to some kind of hearing simply if he *asserts* to college officials that their decision was based on his constitutionally protected conduct. 430 F. 2d, at 944. We have rejected this approach in *Board of Regents* v. *Roth*, *ante*, at — n. 14.

under that program. He claimed that he and others legitimately relied upon an unusual provision that had been in the college's official Faculty Guide for many years:

> "*Teacher Tenure:* Odessa College has no tenure system. The Administration of the College wishes the faculty member to feel that he has permanent tenure as long as his teaching services are satisfactory and as long as he displays a cooperative attitude toward his co-workers and his superiors, and as long as he is happy in his work."

Moreover, the respondent claimed legitimate reliance upon guidelines promulgated by the Coordinating Board of the Texas College and University System that provided that a person, like himself, who had been employed as a teacher in the state college and university system for seven years or more has some form of job tenure.[6]

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[6] The relevant portion of the guidelines, adopted as "Policy Paper 1" by the Coordinating Board on October 16, 1967, reads:

"A. Tenure

"Tenure means assurance to an experienced faculty member that he may expect to continue in his academic position unless adequate cause for dismissal is demonstrated in a fair hearing, following established procedures of due process.

"A specific system of faculty tenure undergirds the integrity of each academic institution. In the Texas public colleges and universities, this tenure system should have these components:

"(1) Beginning with appointment to the rank of full-time instructor or a higher rank, the probationary period for a faculty member shall not exceed seven years, including within this period appropriate full-time service in all institutions of higher education. This is subject to the provision that when, after a term of probationary service of more than three years in one or more institutions, a faculty member is employed by another institution, it may be agreed in writing that his new appointment is for a probationary period of not more than four years (even though thereby the person's total